

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections 12)
and 19 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)

MM Docket No. 92-265

Development of Competition and)
Diversity in Video Programming)
Distribution and Carriage)

REPLY

U S WEST Communications, Inc. ("U S WEST"),¹ through counsel and pursuant to the Federal Communications Commission's ("Commission") Notice of Proposed Rule Making ("Notice" or "NPRM"), released December 24, 1992, hereby replies to comments on the Commission's implementation of Sections 12 and 19 of the 1992 Cable Act² filed on January 25, 1993.

I. INTRODUCTION

In its Comments, U S WEST urged the Commission to adopt rules that ensure that all multichannel video programming

¹U S WEST is a common carrier provider of exchange access and exchange telecommunications services.

²See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, Notice of Proposed Rule Making, FCC 92-543, rel. Dec. 24, 1992. See also Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 1992 U.S.C.A.N., 106 Stat. 1460 (1992) ("Cable Act of 1992" or "Cable Act") (to be codified at 47 U.S.C. §§ 616, 628).

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distributors have fair and equal access to programming.³ Only in this way can the Commission fulfill its Congressional mandate to adopt rules which increase competition and diversity in the multichannel video programming market. U S WEST proposed rules on the use of exclusive contracts and the establishment of a discrimination standard which employ a set of rebuttable presumptions. Such an approach would minimize the administrative burden on the Commission while placing the burden of proof on those cable operators and programming vendors proposing to conduct "business as usual," despite the passage of the Cable Act of 1992.

Numerous parties with cable and programming interests have advocated "creative" interpretations of the Cable Act of 1992 that preserve the status quo and ignore the purpose and plain words of the statute.⁴ The Commission should reject these

³See Comments of U S WEST, filed herein Jan. 25, 1993.

⁴For example, Continental Cablevision argues that exclusive contracts should be presumed to be in the public interest despite Section 628(c)(2)(D)'s prohibition. (See Continental Cablevision Inc. ("Continental Cablevision") at 22-24.) The National Cable Television Association, Inc. ("NCTA") argues that Section 628 only applies to vertically integrated programmers and that actual voting control (i.e., 50% ownership) is required before a cable operator is found to have an attributable interest in a programmer. (See NCTA at 1-2, 14-19.) Similarly, the Joint Parties assert that the Cable Act of 1992 only prohibits discriminatory conduct which prevents or hinders significantly the distribution of programming to subscribers. (See Joint Comments of Cablevision Industries Corporation, Comcast Cable Communications, Inc. and Cox Cable Communications, A Division of Cox Communications, Inc. ("Joint Parties") at 13.) Going even further, Rainbow asserts that discrimination cannot be found unless the public is denied access to programming. (See Rainbow Programming Holdings, Inc. ("Rainbow") at 4-10.) Time Warner
(continued...)

interpretations and concentrate on the plain language of the Act. For example, it is inappropriate for commenters to contend that the provisions of Section 628 only apply to vertically integrated cable operators when the plain words of the Act apply to a much broader class.⁵ In the sections which follow, U S WEST rebuts some of the more strained interpretations of the Cable Act.

II. SECTION 628(c)(2) MANDATES THE MINIMUM CONTENTS OF REGULATIONS AND DOES NOT REQUIRE A SHOWING OF HARM

Many commenters contend that Sections 628(b) and 628(c) must be read together and, as a result, Section 628(c)(2)'s prohibitions only apply where a complainant can show that an act or practice "significantly hindered or prevented" a multichannel video programming distributor from providing programming to subscribers.⁶ This is simply not true. Section 628(c)(2) is entitled the "Minimum contents of regulations" and states that the "regulations to be promulgated under this section shall" [emphasis added] prohibit certain practices. The language of Section 628(c)(2) is not discretionary or conditional; it is

⁴(...continued)
argues that Section 628(c)(2)(B) only prohibits a programming vendor from discriminating "in the contracting for" the sale of programming, not "in the delivery of" programming under existing contracts. (See Time Warner Entertainment Company, L. P. ("Time Warner") at 33; emphasis deleted.)

⁵For instance, Section 628(b)'s prohibition applies to: 1) cable operators, 2) satellite cable programming vendors in which a cable operator has an attributable interest, and 3) satellite broadcast programming vendors. 47 C.F.R. § 628(b).

⁶See e.g., NCTA at 19-23; Superstar Connection at 32-41; Joint Parties at 9-13; TCI at 5-6.

mandatory.⁷ The Commission may not establish a test or threshold -- based on the language of Section 628(b) -- that complainants must first pass before pursuing a cause of action under Section 628(c)(2). On the contrary, Section 628(c)(2)'s prohibitions are mandatory and are not conditioned on a showing of harm, as is the case with Section 628(b).

III. COMMENTERS ERR IN THEIR CLAIM THAT THE COMMISSION WILL BE ENGAGING IN RETROACTIVE RULEMAKING IF IT DOES NOT "GRANDFATHER" EXISTING VIDEO PROGRAMMING CONTRACTS

Commenters argue that the Commission must grandfather existing video programming contracts if retroactive rulemaking is to be avoided.⁸ This is a gross overstatement. The Act does not require nor does the Commission propose to adopt any rules which would impact prices paid for past video programming services or find liability and assess damages for any practices which cable operators engaged in prior to the passage of the Act.

The Act requires that Section 628's prohibitions be enforced on a prospective basis. A vertically integrated cable operator may not engage in unlawful practices on a prospective basis simply because an existing contract allows or requires such actions. The fact that new laws have an impact on existing contracts is hardly surprising -- it is an everyday occurrence in

⁷"'[S]hall' . . . is the language of command[.]" Escoe v. Zerbst, 295 U.S. 490, 493 (1935).

⁸See e.g., TCI at 16-18; United Video, Inc. ("United Video") at 32-36; Turner Broadcasting System, Inc. ("TBS") at 2-5.

the business world.⁹ In fact, Congress anticipated that Section 628's provisions would have an impact on existing contracts. Otherwise, there would have been no need for Congress to include Section 628(h) -- "Exemptions for Prior Contracts."¹⁰

Commenters' overly-broad use of the term retroactive rulemaking is no justification for "grandfathering" existing video programming contracts. Grandfathering would undercut many provisions of the Act and further delay the introduction of competition in the multichannel video programming market.¹¹ As such, the Commission should reject the proposal that existing video programming be grandfathered and require that all affected contracts be brought into compliance with all relevant Commission rules within one year.¹²

⁹Virtually all commercial contracts have clauses which anticipate legal and regulatory changes and require severance or contract revision upon the occurrence of certain events.

¹⁰Commenters rely on Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988) for the proposition that agencies cannot promulgate retroactive rules unless the power is conveyed by Congress in express terms. Unlike Bowen the issue at hand does not deal with the "recoupment" of previously paid sums but only deals with prospective events.

¹¹Time Warner indicated that the average HBO contract runs for five years and that "[r]oughly a third of all present subscribers to the HBO Service are served pursuant to affiliation agreements that run until 1998 or longer." (See Time Warner at 31-32.) If HBO contracts are any indication of the length and scope of other video programming contracts, Commission adoption of a rule grandfathering existing contracts would preclude competition in many parts of the multichannel video programming market.

¹²See U S WEST at 15.

IV. A PRESUMPTION THAT EXCLUSIVE CONTRACTS ARE IN THE PUBLIC INTEREST WOULD BE CONTRARY TO THE PLAIN WORDS OF THE ACT

Several commenters argue that exclusive contracts have greatly benefitted the public over the years and that the Commission should recognize this by adopting a variety of presumptions finding that these contracts are in the public interest.¹³ These commenters ignore the fact that the plain language of the Act prohibits exclusive contracts on a going-forward basis with few exceptions.¹⁴ Instead, commenters concentrate on the public interest exception¹⁵ and urge the Commission to adopt a very liberal interpretation which would effectively turn the Act's prohibition "on its head."

The Commission should reject these arguments as contrary to both the plain language of the Act and Section 628's purpose of increasing competition and diversity in the multichannel video programming market.¹⁶ In fact, rather than adopting an overly-broad public interest exception, the

¹³The most extreme example is Continental Cablevision's proposal that "In the Absence of Coercion, an Exclusive Contract Should be Presumed to be in the Public Interest" (see Continental Cablevision at 22-26). Similarly, TCI asserts that "exclusive contracts should be prohibited only where they deprive an alternative distributor of a vital product" (see TCI at 23-29). See also NCTA at 39-49; Time Warner at 42-45; Joint Parties at 15-19.

¹⁴See Cable Act, § 628(c)(2)(C)-(D), (4), 1992 U.S.C.C.A.N., 106 Stat. at 1494-96.

¹⁵Id. at § 628(c)(4).

¹⁶See id. at § 628(a).

7

Commission should do just the opposite -- and adopt a general rule that exclusive contracts are presumed to be contrary to the public interest.¹⁷

V. CONCLUSION

In implementing Section 628 of the Cable Act of 1992, U S WEST urges the Commission to adopt rules that ensure that all multichannel video programming distributors have fair and equal access to programming.

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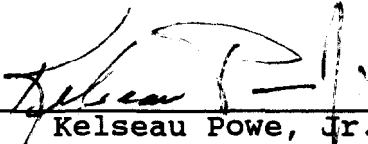
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February 16, 1993

¹⁷ See U S WEST at 7-9.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 16th day of February, 1993, that I have caused a copy of the foregoing **REPLY** to be mailed via first class mail, postage prepaid, to the persons named on the attached service list.



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